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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

XS HOLDING B.V., et al.)	Case No. C08 02282 RMW
)	
Plaintiffs,)	
)	
v.)	DEFENDANT XSLENT, LLC'S <i>EX</i>
)	<i>PARTE</i> APPLICATION FOR ALL
COOL EARTH SOLAR, INC., et al.,)	DEFENDANTS TO BE RELIEVED
)	OF THE OBLIGATIONS OF FRCP
Defendants.)	RULE 26 UNTIL FURTHER
)	ORDER OF THIS COURT

Defendant XSLENT, LLC ["Xscent"] hereby applies *ex parte*, for an order relieving all defendants in this case from their obligation to proceed with, *inter alia*, early disclosures pursuant to FRCP Rule 26 in this matter commenced by XS Holding B.V. ["XS"].

The grounds of the application are that (1) there is already pending a motion to dismiss for want of subject matter jurisdiction and for want of indispensable parties under FRCP Rule 12(b)(1),(7); and (2) any discovery which may eventuate in this case is or will be completely duplicative of that conducted and to be conducted in a State action filed last July styled *XET Holding Co., LLC, et al vs. XS Holding B.V., et al.* Santa Clara Case No. 107-CV 092388 [the "107" Case"], filed on August 20, 2007. The case was assigned for all purposes to the Honorable Brian Walsh. The "107" Case was consolidated with another case 108-CV 106601 [the "108" Case]. The State action is presently set for trial on October 6, 2008, having been continued from the original trial date of June 30, 2008.

1 **1. Background information.** In July, 2007 the management of XET and a sister
2 company XT Technologies, LLC ["XT"] removed one Brian Caffyn [Caffyn] from his position
3 as an officer and soon thereafter exercised their contractual rights to diminish certain of Caffyn's
4 company (XS Holding BV) minority rights to veto certain actions by those two companies. XET
5 and others filed the State action as just described. XS and Caffyn ["XS/Caffyn"] cross-
6 complained. XET obtained a temporary restraining order restraining Caffyn from interfering
7 with the managers' meetings of XET and XT by asserting that he still had a "double" vote on the
8 Boards. Caffyn was further restrained from "attempting to...terminate any contract or similar
9 arrangement with any third party on behalf of XET Holding Co., LLC or Xslent Technologies,
10 LLC". XS/Caffyn moved for its own TRO and OSC re injunction, seeking a court order that he
11 still retained a double vote and that certain veto powers – lost when XS failed to honor its
12 investment obligations – be restored. The hearing on the preliminary injunction proceedings was
13 had over three days in October, 2007.

14 On October 30, 2007, Judge Walsh ruled that XS/Caffyn could not have the relief sought
15 by them. In December of 2007 XS/Caffyn brought another application for temporary restraining
16 order and injunction seeking substantially identical relief, and was accordingly denied.
17 XS/Caffyn thereafter brought on yet another application for temporary restraining order and
18 preliminary injunction, seeking already-litigated relief. As part of its requested relief, XS/Caffyn
19 also sought to enjoin the intellectual property transactions that are the gravamen of its federal
20 case against defendants Cool Earth Solar, Inc. and Nathan Schulhoff. The Superior Court denied
21 XS/Caffyn's application for temporary restraining order wherein he sought to restrain XET from
22 entering into licensing agreements with Nathan Schulhoff and Cool Earth. The subsequent
23 hearing on the injunction, including live evidence, was on April 30, 2008, however, XS/Caffyn
24 did not proceed with that part of his application that involved restraining XET's licenses with
25 Schulhoff and Cool Earth, which agreements are the subject matter of this action.

26 On that same day, Judge Walsh consolidated the "107" and "108" cases before himself
27 for all purposes. Before Judge Walsh could rule on the pending (and redundant) injunction
28 sought by XS/Caffyn, counsel for XS/Caffyn took advantage of the consolidation to immediately

1 file a motion under California Code of Civil Procedure §170.6 to automatically disqualify Judge
 2 Walsh from both cases¹. (A §170.6 motion would have been out of time for the “107” case, but
 3 the addition of the “108” case to Judge Walsh’s “all purpose” status gave XS/Caffyn another
 4 bite at the §170.6 apple which extended to the consolidated action). The consolidated matter is
 5 now before the Honorable Kevin Murphy. XS/Caffyn has now moved to have the case
 6 designated a “complex case” and assigned to one of the two judges (not including Judge Murphy)
 7 dedicated to hearing such cases.

8 The disqualification of Judge Walsh was accomplished by counsel for XS/Caffyn despite
 9 the fact that XS/Caffyn’s most recent (redundant) motion for an injunction was under submission
 10 before Judge Walsh and will now need to be ruled upon by another judge. Additionally, XET’s
 11 motion to compel the deposition of Brian Caffyn was likewise pending before Judge Walsh and
 12 will have to be heard by another judge.

13 Numerous rulings by Judge Walsh have been the subject of writ proceedings and appeals.
 14 To date, XS/Caffyn have not succeeded although there are still two appeals pending.

15 At the commencement of the State matter, counsel for XS/Caffyn, by far the wealthier
 16 party, informed the undersigned that “we are going to give you an octopus”.

17 **2. The commencement of all discovery in this case should await this court’s ruling**
 18 **on the jurisdictional motion.** The undersigned has read the Rule 12 (b) (1), (7) motion with
 19 some care. It appears that this court lacks subject matter jurisdiction. It would be an horrific
 20 economic waste – and an “octopus” diversion of Xslent’s counsel’s time – to participate in
 21 discovery that may well come to naught. The jurisdictional motion is now set for hearing on July
 22 25, 2008. Even if the motion were denied, little would be lost by scheduling the Rule 26 meet
 23 and confer and disclosure requirements until after this court’s ruling.

24 And we have attempted to meet and confer on the issue. On June 16 (today) the various
 25 counsel in the consolidated 107 and 108 cases met in Judge Murphy’s jury room at
 26 approximately 9:30. The undersigned expressly asked counsel for XS/Caffyn to agree to defer
 27

28 ¹Notably, it was XS/Caffyn that originally sought, via unopposed motion, to have Judge Walsh appointed to this case for all purposes.

1 Rule 26 disclosures and the like until after the ruling on the jurisdictional motion. The offer was
 2 rejected by counsel for XS/Caffyn. The undersigned left the meeting to return to the office to
 3 draft this application. Reportedly, after the undersigned left the meeting, counsel for XS/Caffyn
 4 slightly changed their tune and said “we’ll think about it and let you know later today”. It is now
 5 “later today”. No agreement has been forthcoming from XS/Caffyn’s counsel.

6 **3. All of the discovery in this case would be duplicative of discovery already had**
 7 **and to be had in the State action.** Engaging in discovery in this case will do no more than add
 8 a duplicative layer of effort in the already on-going effort for the parties to conclude discovery
 9 and be ready for an October 6, 2008 trial, as scheduled. In view of XS/Caffyn’s threat to “give
 10 you an octopus”, the commencement of this action and the attendant procedural *accouterment*
 11 simply presage more expensive litigation where none is needed.

12 Filed under separate cover are the latest complaint of the original plaintiffs in the 107
 13 case and the latest cross-complaint of XS/Caffyn² for the court’s convenient reference. Also
 14 included will be the latest complaint in the 108 case and XS/Caffyn’s cross-complaint.

15 **4. Conclusion.** The court should order that all discovery, including conformance with
 16 Rule 26, be stayed until further order of this court in accordance with the form of order submitted
 17 concurrently herewith.

18 Dated: June 16, 2008

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By: /s/ Christopher Ashworth
 CHRISTOPHER ASHWORTH

28 _____
²Less exhibits.